STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS PANEL OF JUDGES GRIFFIN, HOOD, AND SAWYER

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

v

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP,

Defendants-Appellants,

and

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Michigan Executive Agency and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants.
_____/

Supreme Court
No. 121890

Court of Appeals
No. 232706

Marquette Co. Circuit Court
No. 00-037979-CE

FREDA MICHELLE HALLEY (P62637)
Attorney for Plaintiffs-Appellees
213 West Liberty St., Ste #200
Ann Arbor, Michigan 48104
(734)769-3351

HAROLD J. MARTIN (P39234)
Attorney for MDEQ & Harding
Assistant Attorney General
110 State Office Building
Escanaba, Michigan 49829
(906)786-0169

MARY MASSARON ROSS (P43885)
KARL A. WEBER (P55335)
Attorneys for Defendants-Appellants
Plunkett & Cooney, P.C.
535 Griswold, Ste #2400
Detroit, Michigan 48226
(313)983-4801

JOHN F. ROHE (P27954)
Attorney for Amicus Camp Quality Michigan
438 East Lake St.
Petoskey, Michigan 49770
(231)347-7327

ORAL ARGUMENT REQUESTED

CAMP QUALITY MICHIGAN BRIEF AMICUS CURIAE AND PROOF OF SERVICE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

MICHIGAN CASES

FEDERAL CASES

U.S. CONSTITUTION

MICHIGAN CONSTITUTION

MICHIGAN STATUTES

FEDERAL STATUTES

OTHER AUTHORITIES

. . . . . Page 6 of 14

Lincoln, Abraham, 2d Annual Message to Congress, December 1, 1862. . . . . Page 13 of 14

Michigan's Land, Michigan's Future: Final Report of the Michigan Land Use Leadership Council, August 15, 2003. <www.michiganlanduse.org.> . . . . . Page 5 of 14

Nelson, Gaylord, *Beyond Earth Day; Fulfilling the Promise*, University of Wisconsin Press, 2002, p. xi. . . . . Page 7 of 14

Report on Carcinogens, Tenth Edition; U.S. Department of Health & Human Services, Public Health Service, National Toxicology Program, December, 2002.<http://ehp.niehs.nih.gov/roc/toc10.html> . . . . . Page 3 of 14

Santayana, George, *The Life of Reason* (1905-1906) Vol. I, "Reason and Common Sense," as quoted in *Bartlett's Familiar Quotations*, 15th Ed., p. 703. . . . Page 8 of 14

Steingraber, Sandra, PhD, *Living Downstream*, Vintage Books, 1998. . . Page 6 of 14

Washington, George, Farewell Address of September 19, 1796. . . . . Page 8 of 14

Wilson, Edward O., *The Diversity of Life*, Harvard University Press, 1992, p. 348. . . . . Page 5 of 14

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Amicus curiae adopts the Appellee's Statement of the Basis of Appellate Jurisdiction.

STATEMENT OF THE QUESTION INVOLVED

CAN THE MICHIGAN LEGISLATURE BY STATUTE CONFER STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING AS RECOGNIZED BY THIS COURT IN *LEE v MACOMB COUNTY BOARD OF COMMISSIONERS*?

The Trial Court answered "No."

The Court of Appeals answered "Yes."

Plaintiffs-Appellees answer "Yes."

Defendants-Appellants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership answer "No."

Amicus Camp Quality Michigan answers "Yes."

STATEMENT OF FACTS

Amicus Curiae Camp Quality Michigan adopts the Appellee's Statement of Facts.

INTEREST OF AMICUS CURIAE CAMP QUALITY MICHIGAN

Amicus is the Michigan chapter of Camp Quality USA, Inc., a Michigan nonprofit, tax-exempt corporation qualified under Section 501(c)(3) of the Internal Revenue Code. Camp Quality provides a year-round support system and recreational opportunities for children afflicted with cancer, and for their siblings. The recreational opportunities include an annual one-week summer camp, a ski camp, a Beaver Island teen camp, and family events. These services are offered at no expense to the families. The siblings are included to afford the parents a reprieve.

The summer camp is commonly held on the grounds of Camp Daggett on Walloon Lake in Charlevoix County. During the week, each child and each sibling is aligned with a trained adult companion for safety and support. The Camp is funded by charitable donations and staffed principally by volunteers.

By the nature of their predicament, childhood victims of carcinogens will seldom exercise their standing in court. Amicus knows of no case in which a Camp Quality camper was involved in environmental litigation. The children with the strongest claim to judicial standing are ill-equipped to add the burdens of litigation to their challenged lives. They are sidelined, silenced, and side-stepped.

They are sidelined by medical treatments and by perennially-tardy school assignments. In more tragic circumstances, the campers will not return to Camp Quality. They are silenced. The persons with unassailable judicial standing are also side-stepped in litigation. The U.S. Department of Health & Human Services, Public Health Service, National Toxicology Program identifies over 200 carcinogens deftly

wafting through the air, percolating in our groundwater, and rushing through streams.[1] The cancer victim is confronted with a dizzying array of toxins. The chain of causation is blurred. Prospective defendants are camouflaged. Isolating one of many carcinogens is, at best, speculative. The prospect of pinpointing a particular defendant is no better. In short, Camp Quality children are sidelined, silenced, or side-stepped.

Other children may cultivate an aptitude to vindicate a wrong and claim retribution. These skills will often go untested for the cancer victim. Moreover, the adversarial nature of litigation would seldom be considered good therapy for children in desperate need of the opportunity to be children. These children must learn a new and different set of skills to cope with life. They learn to surrender their autonomy to the medical community, to endure nausea, fatigue, examinations, grief-ridden hospital visits, all the while hoping to not hear the words "massive reoccurrence." They learn to courageously lie under the crosshairs of photon-emitting cyclotrons. Adversarial skills are generally not fostered in this setting.

Amicus is determined to create a fulfilling and enriching life experience for the special children impacted by carcinogenic influences. Their medical visits are punctuated by a return to the same environmental condition, resulting in a cyclic rendevous with fate. Camp Quality campers would not decline the good will of "any person" in protecting their web of life. Neither should we. To make this state safe for children, "any person" should not be silenced on the court's Do Not Call List.

---

[1] Report on Carcinogens, Tenth Edition; U.S. Department of Health & Human Services, Public Health Service, National Toxicology Program, December, 2002, <http://ehp.niehs.nih.gov/roc/toc10.html>.

ARGUMENT

THE MICHIGAN LEGISLATURE CAN, BY STATUTE, CREATE A CAUSE OF ACTION AND CONFER STANDING ON A PARTY UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT WHERE THE TRADITIONAL JUDICIAL TEST FOR STANDING, AS RECOGNIZED IN *LEE v MACOMB COUNTY BOARD OF COMMISSIONERS*, CREATES OBSCURED TRAILS OF CAUSATION, HAZARDOUS DELAYS AND INFRINGES CONSTITUTIONAL LEGISLATIVE AUTHORITY.

I. STANDARD OF REVIEW.

The Supreme Court has defined the standard of review in standing cases in *Lee* v *Macomb Co Bd of Comm'rs*, 464 Mich 726, 735; 629 NW2d 900 (2001): "Whether a party has standing is a question of law. This Court reviews questions of law de novo. *Stitt* v *Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000)."

II. INTRODUCTION.

The Michigan Environmental Protection Act ("MEPA")[2] was adopted in 1970 during the Milliken administration. Section 1701(1) empowered "any person" to maintain an action "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

"Any person," and every life, is perilously embedded in a fragile, yet resilient, web of life. Carcinogens unpredictably swirl through this web, selecting their victims with random fury. The predators of an earlier day left fingerprints. In the media, they conveniently donned black hats. Strategies of the sleuth in the days of black-capped villainy are of little avail. Toxic villainy leaves an elusive trail of causation.

---

[2] MCL 324.1701 et. seq.

The path to the thief of a childhood stolen by carcinogens is deep and complex. While countenancing life's challenges, the victim's claim for vindication is blurred by the multitude of carcinogens and the broad spectrum of prospective defendants.

III. MICHIGAN IS INEXTRICABLY IN OUR LIVES.

> Humanity is part of nature. A species that evolved with other species. The more closely we identify ourselves with the rest of life, the more quickly we will be able to discover the sources of human sensibility and acquire the knowledge on which an enduring ethic, a sense of preferred direction, can be built. Wilson, Edward O., *The Diversity of Life*, Harvard University Press, 1992, p. 348.

Ten thousand years ago, receding glaciers unveiled deep, rich soils, while cleaving navigable channels and percolating waters. The Great Lakes comprise 95% of the surface fresh water in the United States, while over 11,000 inland lakes, and 36,000 miles of streams flow across Michigan's watershed.[3]

Michigan is a leader in agricultural production. Our agricultural harvests are found in roadside stands, along store shelves, and even on the boxes of processed foods; hydrogenated soybean oil, cornstarch, hydrolyzed corn, wheat protein, high fructose corn syrup, wheat gluten, to name a few.

We consume Michigan's products. We bathe in her waters. Inhale her air currents. Michigan is not just a geographical area or political unit. Her products rush through our veins, infuse our lungs, and drench our pores. Our tissues become living scrolls inscribed with Michigan's products. We cannot just occupy this state and count our possessions. Rather, Michigan occupies us. We become possessed. We do not

---

[3]*Michigan's Land, Michigan's Future: Final Report of the Michigan Land Use Leadership Council*, August 15, 2003. page 11, <www.michiganlanduse.org>.

just live in this state. In a very real sense, Michigan lives in us. The bedrock of a human food chain lies underfoot, inhabits our airstreams, and surrounds our lives. In Michigan, "any person" is a part of, not apart from, nature.

Amicus respectfully submits that "any person" need not be clinically tagged by carcinogenic toxins to have judicial standing. We are all "living downstream."[4] Appreciating threats to Michigan's web of life inspires tenacity in litigation. This also establishes the basis for legislative standing.

IV. MICHIGAN'S INTIMATE RELATIONSHIP WITH LIFE PROVIDES A LEGITIMATE BASIS FOR THE LEGISLATURE TO CONFER STANDING UPON "ANY PERSON" IN MEPA CLAIMS .

In 1978, the Institute for Scientific Information reported that the 1968 essay by Garrett Hardin, Ph.D. entitled "The Tragedy of the Commons"[5] was "one of the most cited items in its field" according to the Science Citation Index and the Social Science Citation Index.[6]

Hardin's "Tragedy of the Commons" became a metaphor. Dr. Hardin drew an analogy to the English commons on which cattle were grazed. Individual ranchers had the incentive to spread the costs of grazing their cattle over the shared commons. The costs were thus commonized. Profits, however, were privatized. Private incentives eventually caused the carrying capacity of the commons to be breached. Dr. Hardin

---

[4] The phrase "living downstream" is unapologetically borrowed from Steingraber, Sandra, PhD, *Living Downstream*, Vintage Books, 1998.

[5] Hardin, Garrett, PhD, "The Tragedy of the Commons," *Science*, 162 (1968): 1243-1248.

[6] Garrett Hardin Society Website, <www.garretthardinsociety.org/gh/gh_cv.html>.

characterized these incentives as "The Double C - Double P Game" ("Commonizing Costs" and "Privatizing Profits").[7] By analogy, "the tragedy of the commons" incentives were metaphorically extended to our relationship with air, water, and land.

The tragedy of our commons found expression in flammable rivers, closed beaches, contaminated groundwater, and toxic hazards. This culminated in 20 million demonstrators taking to the streets on Earth Day 1970, according to Walter Cronkite.[8] The event, organized by Senator Gaylord Nelson, was by far the largest demonstration in our nation's history.[9] It seared an imprint on the conscience of a nation.

In 1970, Earth Day became the impetus for a host of federal and state environmental regulations, including MEPA. Our sensitivities were nurtured by appreciating the root cause of environmental harm and threats to the web of life. These lessons can recede in the rearview mirror, like history itself. If they are lodged beyond our institutional memory, we will be caused to reinvent toxic hazards of the 1960's.

In 1970, the Michigan legislature conferred standing upon "any person" in "declaratory and equitable" proceedings to protect "the air, water, and other natural resources, and the public trust." This legislative decision did not emerge in a vacuum. It was the product of sensitivities engendered by environmental casualties. George Santayana would have urged: "Those who cannot remember the past are condemned

---

[7] Hardin, Garrett, *Living Within Limits*, Oxford University Press, 1993, Chapter 23.

[8] Nelson, Gaylord, *Beyond Earth Day; Fulfilling the Promise*, University of Wisconsin Press, 2002, p. xi.

[9] *The Social Contract*, Vol. XIII, No. 4, Summer 2003, "The 'Founding Father' of Earth Day: An Interview with Gaylord Nelson."

to repeat it."[10]

By empowering citizens to care for the public trust with declaratory and equitable relief, the legislature conferred standing before particularized infirmities disrupt human life. With this foresight, we have eliminated some toxic conditions, but as the Camp Quality campers would attest, it is still too early to relax our guard.

V. IT IS WITHIN THE SEPARATE PROVINCE OF THE LEGISLATURE TO CREATE CAUSES OF ACTION.

Respect for separate governmental functions enjoys a long precedent. On September 19, 1796, George Washington's Farewell Address cautioned against the risk of encroachment:

> The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. – A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. – The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. – To preserve them must be as necessary as to institute them.

Separation of powers is addressed in Article 3, Section 2 of the Michigan Constitution of 1963:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

In *Civil Service Commission* v *Auditor General*, 302 Mich 673, 683; 5 NW2d 536

---

[10] Santayana, George, *The Life of Reason* (1905-1906) Vol. I, "Reason and Common Sense," as quoted in *Bartlett's Familiar Quotations*, 15th Ed., p. 703.

(1942), the Michigan Supreme Court confirmed the separateness of powers among the branches of government:

> This historical and constitutional division of powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another.

The United States Supreme Court described these separate powers with clarity and brevity in *Massachusetts* v *Mellon*, 262 US 447, 488 (1923):

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the actions of the other.

In short, the legislature has the "duty of making laws." Separate judicial powers "interpret and apply" legislative enactments.

To create a cause of action is uniquely a legislative function. For example, persons have been given legislative standing to initiate causes of action under the Michigan Consumer Protection Act,[11] the RICO conspiracy statute,[12] the drug conspiracy statute,[13] Section 1983,[14] "Qui Tam" the Federal False Claims Act,[15] the

---

[11] MCL 445.901 et. seq.

[12] 18 USC 1962(d).

[13] 21 USC 846.

[14] 42 USC 1983.

[15] 31 USC 3730.

Michigan Civil Rights Act,[16] the Whistleblower's Protection Act,[17] the Michigan Handicapper's Civil Rights Act,[18] the Anti-Stalking law,[19] the Michigan Builders Trust Fund Act,[20] and the Michigan Construction Lien Act.[21] The legislature can also curtail a cause of action, as in the "mini-tort" section of the No Fault Act,[22] the statute of limitations,[23] and in the cap on non-economic losses in medical malpractice claims.[24] Every new cause of action created by the legislature widens the circle of legislative standing. Even if the legislature tried, it could not delegate this legislative function to another body.[25]

By empowering "any person" to initiate a MEPA claim for declaratory or injunctive relief, the Michigan legislature performed a legislative function. The legislature recognized that "any person" is inextricably bound to our web of life. In creating a meaningful cause of action, the legislature decided to not confine MEPA claims to those

---

[16] MCL 37.2101 et. seq.

[17] MCL 15.361 et. seq.

[18] MCL 37.1101 et. seq.

[19] MCL 750.411(h) and MCL 750.411(i).

[20] MCL 570.151 et. seq.

[21] MCL 570.1101 et. seq.

[22] MCL 500.3135(3)(e).

[23] MCL 600.5801 et. seq.

[24] MCL 600.1483.

[25] *Coffman* v *State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951), and *Colony Town Club* v *Michigan Unemployment Compensation Comm*, 301 Mich 107; 3 NW2d 28 (1942).

sidelined, silenced, or side-stepped.

VI. JUDICIAL POWERS GOVERNING PRACTICE AND PROCEDURE WERE NOT UNDERMINED BY MEPA.

The Michigan Constitution created judicial authority to make rules that "establish, modify, amend, and simplify the practice and procedure in all courts of this state."[26] Unlike the "case or controversy" requirement[27] of the U.S. Constitution, judicial authority in Michigan extends to matters of "practice and procedure." The legislature, not the judiciary, is Constitutionally empowered to adopt substantive laws.[28]

This Court invoked the *Lee* case[29] in framing the issue on appeal. Unlike the present appeal, *Lee* did not address standing explicitly created by legislation.

Specific legislative responsibilities are defined in Article 4 of the 1963 Michigan Constitution. Section 52 provides for a "paramount public concern":

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

"Protection" must be "**from**" not "**after**" pollution, impairment and destruction. This "paramount public concern" will be sacrificed on the altar of judicial procedure if toxic harm must metastasize in particularity before "any person" can be legislatively

---

[26] Mich. Const 1963, art 6, § 5.

[27] US Const, art III, § 2.

[28] Mich. Const 1963, art 3, § 7, *McDougall* v *Schanz*, 461 Mich 15, 27, 36; 597 NW2d 148 (1999); *Zdrojewski* v *Murphy*, 254 Mich App 50, 81; 657 NW2d 721 (2002).

[29] *Lee* v *Macomb Co Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001).

empowered to take action.

The present appeal contrasts a legislatively-created cause of action with judicial procedures. Judicial standing principles are designed to assure adversarial advocacy.[30] Here, the legislative empowerment of "any person" in life's fragile web to pursue declaratory or equitable relief protects this procedural requirement.

VII. TO AWAIT PARTICULARIZED ENVIRONMENTAL HARM IS TO COURT DISASTER.

Appellant would have this Court believe the appeal involves a turf war between the legislature and the judiciary. It would condemn the 1970 legislature for furtively slipping across the judicial - legislative divide under the cover of darkness to spirit away judicial powers. Reality might be more mundane.

In the *Lee* case,[31] the majority opinion adopted the *Lujan* test[32] in finding a lack of standing because there was no "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" It is within the legislative prerogative to conclude that by the time a trail of causation on environmental harm becomes clinically concrete, particularized, actual, or imminent,[33] it can be too late to cure.

The legislature can take note of our precarious niche in the web of life. Risk of

---

[30] *Flint, A New Brand of Representational Standing*, 70 U Chi L Rev 1037.

[31] *Lee, supra*, at 740; *Lujan, supra*, at 560.

[32] *Lujan* v *Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed2d 351 (1992).

[33] *Lee* v *Macomb, supra, at* 740.

harm that might seem conjectural or hypothetical from one vantage becomes palpable for the biologist and toxicologist.

Inextricability reigns supreme in the world of toxins. An ounce of PBB prevention would have saved a generous pound of cure. By arming "any person" with a MEPA claim before the metastasis of particularized harm, the legislature averts broad commonized suffering. In meeting its constitutional charge, the legislature can empower "any person" to take action before deadly delays.

The very effort to commonize costs in Hardin's "Tragedy of the Commons" blurs the claim of a particularized plaintiff. Those inflicting widespread environmental harm seldom leave fingerprints. As multiple polluters emit toxins from taller smokestacks, the medical costs are more widely commonized. The trail of causation becomes further obscured, and the image of "any person" in the line of fire is muted. Only the cynic would conclude that the solution to pollution is dilution. Ours is a new day. In the words of Abraham Lincoln, "As our case is new, so we must think anew and act anew. We must disenthrall ourselves . . ."[34]

Airborne and waterbound carcinogens descend upon Michigan. They spiral up the food chain, coming to rest in the life of "any person." In confronting this threat, no one has a more compelling adversarial incentive than "any person."

The random bullet of a gunman in a crowded theater is neither hypothetical nor conjectural. This Court would not hesitate to honor the legislative decision to confer standing upon any theater-goer before the trigger is pulled.

---

[34] Abraham Lincoln, 2d Annual Message to Congress, December 1, 1862.

While we strive to become good parents, good friends, and good spouses, we are also united in the human imperative to become good ancestors. This fundamental responsibility will be dishonored if we must patiently wait for the random, but particularized, victim of environmental harm to prove a complex trail of causation against a field of producers scrambling to commonize costs.

VIII. CONCLUSION.

It is well within the legislative function to enlist the support of "any person" to make Michigan safe for human habitation.

Garrett Hardin, author of "The Tragedy of the Commons," also gave us Hardin's Law: "We can never do merely one thing."[35] Dr. Hardin often quipped: "And then what?" If judicial procedural authority usurps this legilative cause of action, we might ponder: "And then what?"

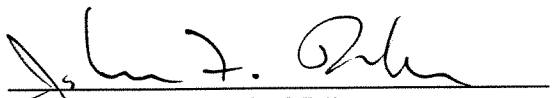
Smart money will be on taller chimneys, rather than on better scrubbers.

Amicus respectfully requests this Court affirm the Court of Appeals' decision.

IX. PROOF OF SERVICE.

I certify that, on this date, two copies of this Brief are being sent, by First Class Mail, to each law firm identified in the caption.

Respectfully submitted,



DATE: October 20, 2003

John F. Rohe (P27954)
Attorney for Camp Quality Michigan

---

[35] Hardin, Garrett, *Living Within Limits*, Oxford University Press, 1993, p. 199.